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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Bentley Price, Circuit Court Judge

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SC Court of Appeals

Case No.: 2019-CP-10-00178
Appellate Case No.: 2019-001237

J. DANIEL MAHONEY...Plaintiff / Respondent,

v.

THE MUHLER COMPANY, INC. and HENRY M. HAY, III, in his individual capacity,
Defendants/Appellants..Defendants / Appellants.

PETITION FOR REHEARING

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ATTORNEYS FOR APPELLANTS

Appellants, The Muhler Company, Inc. and Henry M. Hay, III, petition this Court pursuant to Rules 240(j), 221, and 219 S.C.A.C.R., for rehearing and *en banc* review of this Court's Order filed October 25, 2019 ("the Order"). The Order granted Respondent J. Daniel Mahoney's motion to dismiss the appeal, finding that the order appealed from granted a motion to compel arbitration and is therefore not immediately appealable. This was in error and Appellants seek rehearing *en banc* on the following bases.

I. Manifest Error

Under South Carolina and Federal law, arbitrator selection clauses must be enforced by the court. S.C. Code Ann. § 15-48-30 ("If the arbitration agreement provides a method of appointment of arbitrators, this method ***shall be followed***." (emphasis added)); 9 U.S.C. § 5 ("If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method ***shall be followed***." (emphasis added)). The trial court struck the parties' arbitrator selection provision and then substituted its own arbitrator selection process. In substituting its own method, the trial court cites and quotes as support the very statute that says the substitution is prohibited and that the original method must be enforced. *See* **Exh. A** (Order, June 24, 2019) at ¶ 4. Whatever end-result is reached by the panel appointed by the trial court's substituted method will be reversed, because it will be based upon manifest error in the selection of the arbitrators. There is no interpretation required; the error of the trial court's order is obvious on its face.

Reversal is inevitable, and the only question is when the reversal will occur. If it occurs after this rehearing request, petition for *certiorari*, trial, and subsequent appeal, it will be three to five years from now. Alternatively, if it occurs in this appeal upon a motion by the Appellants to decide the case on the briefs, it can occur within the next eight to nine months.

II. Immediately Appealable

The Order dismissing this appeal overlooks and/or misapprehends the nature of the trial court order appealed from. Though styled an order "granting" the motion to compel arbitration, in reality it denies Appellants a right expressly set forth in the state and federal arbitration acts — to contractually establish the manner in which the arbitrators will be selected. At best, then, the order grants the motion in part and denies it in part by ordering arbitration on terms other than what are set forth in the arbitration provision. In light of the strong state and federal policy in favor of arbitration, and because any order denying a motion to compel arbitration is immediately appealable,[1] an order that denies such a motion *even in part* must also be immediately appealable.[2]

The arbitrator selection clause in the parties' agreement states that each party to the dispute will select one arbitrator, both of whom will be CPAs, and the third arbitrator will be an employee of the accounting firm most recently employed by the Muhler Company. The trial court deemed the arbitrator selection provision "inequitable" and then rewrote it so that the court itself chose the third arbitrator (which a court is not permitted to do), before revising the ruling and simply striking the arbitrator selection provision entirely (rather than enforcing it, as a court is required to do).

In addition to how the three arbitrators are chosen, the arbitrator selection provision requires that all three arbitrators be CPAs, given that the disputes in question are most likely to be financial in nature. Since the order dismissing this appeal was entered however, Respondent Mahoney has appointed a non-CPA as his party-appointed arbitrator, instead naming an attorney

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[1] *E.g.*, *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626, 667 S.E.2d 1, 4 (Ct. App. 2008).

[2] This appears to be a matter of first impression in South Carolina, *see infra* Part III, rendering it of "exceptional importance" such that the matter should be heard *en banc* rather than being dismissed on a motion.

whose primary areas of practice are Personal Injury, Wrongful Death, Trucking Accidents, Motorcycle Accidents, Aviation Disasters, Premises Liability, Probate Litigation, Trust Disputes, Criminal Defense (City, State and Federal Charges), DUI Defense, Business and Shareholder Litigation, and Securities Litigation. So not only has the identity of the third arbitrator been altered by the trial court's ruling, but the required qualifications of the arbitrators have also been removed.[3]

By preventing arbitration pursuant to the express terms of the arbitration agreement, the trial court cannot be said to have "granted" the motion to compel arbitration. To illustrate, if a court ordered arbitration to proceed but changed the arbitration agreement so that the arbitration (i) was not binding, (ii) was to be performed pursuant to the South Carolina Rules of Civil Procedure with full discovery, and (iii) was to proceed not in front of arbitrators selected by the parties but in front of an arbitrator the court selected, would that properly be considered an order "granting" a motion to compel arbitration?

However the trial court's order is styled, it denies Appellants' motion to arbitrate pursuant to the parties' arbitration agreement, and it is immediately appealable.

III. Exceptional Importance

It is a matter of first impression whether, under South Carolina law, an order that is styled as "granting" a motion to compel arbitration pursuant to an arbitration agreement but denies an arbitration right set forth in that agreement is immediately appealable. The question is thus of exceptional importance and should be reheard *en banc*. Moreover, a negative answer to the question would run contrary to (i) the policy that parties' unambiguous agreements should be

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[3] Appellants do not believe this was the intent of the trial court's order, which was concerned with the identity of the third arbitrator, not the qualifications of the three arbitrators. This is another ground for reversal of the trial court's order.

enforced and (ii) the strong state and federal policy in favor of arbitration. These policies are themselves of exceptional importance.

Further, should this Court not rehear this issue, there is a risk that other parties will be able to gut the procedures set forth in an arbitration agreement and be safe from immediate appeal simply by calling the order in question an order "granting" the motion to compel arbitration. This would substantially weaken the policy in favor of arbitration.

These are issues of exceptional importance, and Appellants request rehearing before this Court *en banc*.

IV. Conclusion

For the reasons set forth herein, and for the reasons and arguments set forth in Appellants' briefs in this matter, all of which are incorporated herein, this Court should grant rehearing of the order dismissing this appeal.

This 7th day of November, 2019
Charleston, S.C.

Respectfully submitted:

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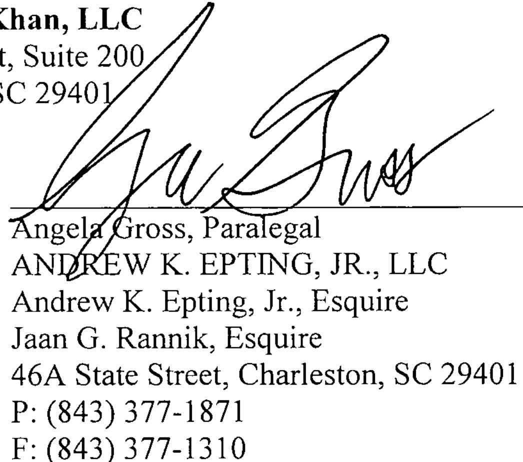
Defendants/Appellants...Defendants / Appellants.

PROOF OF SERVICE

The undersigned does hereby certify that he/she has served all counsel in this action with a copy of the Petition for Rehearing by mailing a copy of the same by United States Mail, postage prepaid, to the following:

Clayton B. McCullough, Esquire
McCullough Khan, LLC
359 King Street, Suite 200
Charleston, SC 29401



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November 8, 2019

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

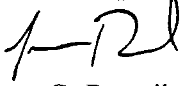
RE: *J. Daniel Mahoney v. The Muhler Company, Inc. and Henry M. Hay, III*
Case No.: 2019-CP-10-00178
Appellate Case No.: 2019-001237

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven copies of the Petition for Hearing, together with a Proof of Service in the above-referenced appeal. I have also enclosed my firm's check in the amount of $50.00.

With thanks and kindest regards,

ANDREW K. EPTING, JR., LLC



Jaan G. Rannik

cc: Clay McCullough, Esquire

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